

RICHARD TSEN WEI TSENG

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v.

HSBC BANK MALAYSIA BHD

HIGH COURT SABAH & SARAWAK, KUCHING

B

DAVID WONG DAK WAH JC

[CIVIL APPEAL NO. 12-30-2005-III]

23 FEBRUARY 2006

CIVIL PROCEDURE: *Default judgment - Setting aside - Irregular judgment - Whether can be set aside ex debito justitiae*

C

CIVIL PROCEDURE: *Default judgment - Setting aside - Amendment - Whether court can amend default judgment in absence of formal application*

D

CIVIL PROCEDURE: *Default judgment - Setting aside - Interpretation - Statement of claim and default judgment to be read together*

CIVIL PROCEDURE: *Costs - Default judgment - Whether defendant can be shut out from disputing amount of costs in a default judgment*

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CIVIL PROCEDURE: *Irregularity - Nullity and irregularity - Distinction between - Whether non compliance with rules of courts will nullify proceedings - Rules of the High Court 1980, O. 2 r. 1(1)*

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The respondent/plaintiff claimed against the appellant/defendant in the Sessions Court a sum of RM86,743.14, being monies due under a Visa Platinum Card and other charges thereon. Upon being served with summons and the statement of claim on the 30 August 2005, the appellant by a letter replied to the respondent's solicitor indicating that he would not be attending court. On 23 November 2004, the respondent entered judgment in default of appearance ("default judgment") against the appellant. The sealed judgment was served on the appellant on 18 January 2005.

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The appellant then applied to set aside the default judgment and the Sessions Court judge dismissed the application. The appellant appealed against this decision praying that the default judgment be set aside. Appellant's counsel raised the following three grounds in his submissions: (i) that cl. 2 of the default judgment was vague and uncertain; (ii) that there was a breach of cl. 7(g) of the agreement by the respondent by using the terms "until full and

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- A final settlement” in cl. 2 of the default judgment; and (iii) that the terms in the default judgment were different from the prayers in the statement of claim. Counsel’s complaint was that the sum of RM6,739.82, being the respondent’s legal fees and disbursements, was never quantified in the statement of claim and hence could
- B not be included in the default judgment. Therefore, he submitted that the inclusion of RM6,739.82 made the default judgment irregular and on this ground alone it should be set aside *ex debito justitiae*.
- C **Held (dismissing the appeal with cost):**
- (1) In relation to the court’s power to amend a default judgment in the absence of a formal application by a plaintiff, the prime consideration is regard to the justice of the case and not a blinkered fixation to the rules. (para 6)
- D (2) Order 2 r. 1(1) of the Rules of the High Court 1980 has done away with the old distinction between nullities and irregularities such that any non compliance with the rules of the courts will be treated as an irregularity and would not
- E nullify the proceedings. (paras 9 & 10)
- (3) The general rule that when it is found by the court that a judgment has not been obtained regularly, the defendant is entitled to have it set aside *ex debito justitiae* is no longer
- F correct. Irregular judgments will not be automatically set aside. The courts will ask the question whether or not the irregularity is so fundamental that it would be in interest of justice to allow it to survive or not. This involves in some circumstances looking at the merits or non merits of the
- G defense. Further, if the court finds that there is no prejudice to the parties or justice demands it, the court will amend the irregularities in the default judgment. (para 11)
- (4) The statement of claim and the default judgment must be read
- H together and not individually. When they were read together there was no confusion what minimum amount meant as it was defined, and furthermore how the debt was calculated was exhibited by the respondents in their affidavits. (para 20)
- I (5) The appellant was not given a chance to be heard as to whether or not the 13th Schedule of the Advocates Remuneration Rules 1988 applied. The letter to the registrar was not copied to the appellant. Though this may be an

established practice, it is nevertheless a wrong one which must be stopped. No doubt that the successful parties are entitled to their costs but the defendant cannot be shut out from disputing the amount. That part of the judgment was therefore irregular. (para 25)

- (6) However, there was no genuine dispute by the defendant as to the claimed amount. The proposed defense was littered with the phrase “the plaintiff is put to strict proof”. It is trite law that mere denials do not amount to a defense. Further, this was not a case where the court should set aside the whole judgment because of this irregularity. The interest of justice demanded that the court amend cl. 4 of the default judgment. (paras 28 & 32)

Case(s) referred to:

Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd [1995] 3 CLJ 690 CA (*refd*)

Cheow Chew Khoon v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 CA (*refd*)

Chong Chow Fong v. Ban Tuck (M) Sdn Bhd [1983] 2 CLJ 25; [1983] CLJ (Rep) 508 HC (*refd*)

Lai Yoke Ngan v. Chin Teck Kwee [1997] 3 CLJ 305 FC (*refd*)

Lee Tain Tsung v. Hong Leong Finance Bhd [2000] 4 CLJ 15 CA (*refd*)

Malaysia Building Society Bhd v. Lesco Development Corp Sdn Bhd & Ors [1988] 3 MLJ 273 (*refd*)

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. BBMB [2002] 1 CLJ 645 FC (*refd*)

Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 SC (*refd*)

Wallingford v. Mutual Society [1880] 5 App Cas 685 (*refd*)

Legislation referred to:

Rules of the High Court 1980, O. 1A, O. 2 rr. 1(1), 2

For the appellant - Kenny Yi; M/s Yi & Co

For the respondent - Ee Yen-Tse; M/s Ee & Lim

Reported by Amutha Suppayah

JUDGMENT

David Wong Dak Wah JC:

Appeal

[1] This is an appeal by the appellant/defendant (the appellant) against the whole of the decision of the Sessions Court, dated 28 October 2005, in dismissing the appellant's application to set aside

A the judgment in default of appearance dated 23 November 2004 (default judgment) obtained by the respondent/plaintiff (the respondent) against the appellant.

[2] The aforesaid application was for the following reliefs:

- B (1) the default judgment be set aside;
- (2) the appellant be at liberty to defend this action by filing a defence within 30 days from the date of the order;
- C (3) the time for the appellant to set aside the default judgment be enlarged if so required; and
- (4) pending final disposal of (1) the execution of the default judgment be stayed.

D [3] As for reliefs (3) and (4), they are non issues as Mr. Ee Yen-Tse, counsel for respondent, is not objecting to both reliefs. This only leaves one question before me and that is whether or not the default judgment ought to be set aside.

E **Background**

[4] The respondent's claim is for the sum of RM86,743.14 being monies due under a Visa Platinum Card, late payment charge and finance charge thereon as from 19 June 2004 until full and final settlement thereof legal fees, expenses and costs. Upon being served with summons and the statement of claim on 30 August 2005, the appellant by a letter dated 17 November 2005 (exh. R2) replied to the respondent's solicitor indicating that he would not be attending court. On 23 November 2004, the respondent entered judgment in default of appearance against the appellant. On 17 January 2006 the appellant wrote to the respondent's solicitor to enquire the status of the case. The sealed judgment was served on the appellant by a letter dated 18 January 2005

Defendant's Contentions

H [5] Mr. Kenny Yi, counsel for the appellant, raises three grounds in his submissions and they are:

- I 1. Clause 2 of the default judgment is vague and uncertain;
2. There is a breach of cl. 7(g) of the agreement by the respondent by using the terms "until full and final settlement" in cl. 2 of the default judgment; and

3. The terms in the default judgment are different from the prayers in the statement of claim, hence it is irregular and ought to be set aside as of right.

Applicable Legal Principles

[6] The first principle relates to the court's power to amend a default judgment in the absence of a formal application by a plaintiff. Mr. Kenny Yi in his second written submission submits that since there is no application to amend before the court, the default judgment ought not to be amended by me even if there is ground to do so. That approach with respect belongs to the bad old days where the rules of court became the masters rather than servants to the dispensation of justice. Fortunately we have moved on from those days. Now the prime consideration is regard to the justice of the case and not a blinkered fixation to the rules. In the case of *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. BBMB* [2002] 1 CLJ 645, the Federal Court through the late Tan Sri Mohtar Abdullah FCJ, said:

A judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his **blinkered fixation on technicalities of the rules** and the cold letter of the law ...

The duty of the Federal Court, as the apex Court, to ensure that justice is done outweighs any procedural technicality preventing it from being done. When a case is brought before the Federal Court, the Court is so seized of the jurisdiction over the case. So seized, the Federal Court must decide the case in the interest of justice, to redress wrong and uphold the right, uninhibited by the technicalities strewn in its path.

[7] This philosophy is now embodied in O. 1A RHC which states as follows:

In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

[8] In any event even without the O. 1A RHC, the Court of Appeal in *Lee Tain Tsung v. Hong Leong Finance Bhd* [2000] 4 CLJ 15 had spoken and this is how NH Chan JCA puts it:

In *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 Gopal Sri Ram JCA said at 482:

- A Now, it is an established principle that in monetary claims, the amount for which judgment is entered must be limited to the amount actually due: *Hughes v. Justin* [1894] 1 QB 667, *Muir v. Jenks* [1913] 2 KB 412. ... If judgment is entered for more than is actually due, it is liable to be set aside. If an error appears in the judgment then this may be corrected in the following circumstance:
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- (i) on an application duly made by the plaintiff in that behalf: *Armitage v. Parsons* [1908] 2 KB 410;
- C (ii) on an application made by the defendant to set aside the judgment: *Ban Hin Lee Bank Bhd v. Somali Bank* (The Independent, 28 November 1988), CA; and
- (iii) *ex parte*, where the defendant consents to such a course.
- D The above *dicta* regarding the circumstances on which an error in the judgment amount may be corrected require some explanation lest it be misunderstood. If judgment was obtained for the wrong amount, it is true the plaintiff may apply to have the judgment amount corrected. This is because O. 2 r. 1(2) empowers the court “to allow such amendments (if any) to be made”. Strictly speaking, the authority for this is not *Armitage v. Parsons* [1908] 2 KB 410 which is an old case decided long before O. 2 took its present form but is the rule (r. 1(2)) itself which empowers the court to amend. But on an application made by the defendant to set aside the judgment because it was entered for too much, the court may under O. 2 r. 1(2) set aside either wholly or in part
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- F the judgment or (regardless of who had initiated the application to set aside) exercise its powers under the RHC “to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit”. Compare this with the previous position under the old cases of *Hughes v. Justin* [1894] 1 QB 667 and *Muir v. Jenks*, *supra*, where the law was that unless the party who held the judgment applied to have the incorrect sum put right, the defendant was (upon the authority of *Hughes v. Justin*) entitled as of right to have the judgment for the incorrect amount set aside. See Buckley LJ in *Muir v. Jenks*, *supra*, at 417 where he said:
- G
- H ... *Hughes v. Justin* is an authority for the following proposition: If the plaintiff in the absence of the defendant, proceeding properly under the rules, signs judgment for a sum in excess of that which is due to him, the defendant is entitled to have that judgment set aside, unless the party who holds the judgment applies as he may to reduce it to the proper amount. If application to amend be duly made it may be right not to set the judgment aside but to reduce it to the proper sum; but unless the party who holds the
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judgment elects to have it put right, then upon the authority of *Hughes v. Justin* it seems to me the defendant is entitled to say "This is a wrong judgment, set it aside."

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In the case of *Armitage v. Parsons* the right to amend which I have mentioned was exercised.

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There was then no power as there is now in O. 2 r. 1(2) for the court to allow amendments to be made without regard to who had initiated the application to have the judgment set aside.

[9] The next principle of law relates to O. 2 r. 1(1) RHC which states as follows:

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Rule 1. Non-compliance with rules. (O. 2 r. 1)

(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

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(2) Subject to paragraph (3) the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

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(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.

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Rule 2. Application to set aside for irregularity. (O. 2 r. 2)

(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

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- A (2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.

B [10] The aforesaid order has done away with the old distinction between nullities and irregularities such that any non compliance with the rules of the courts will be treated as an irregularity and would not nullify the proceedings. (see *Lee Tain Tsung v. Hong Leong Finance Bhd (supra)* and Gopal Sri Ram JCA's judgments in *Lai Yoke Ngan v. Chin Teck Kwee* [1997] 3 CLJ 305 and *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 4 CLJ 127).

C [11] The upshot of this development is that the general rule that when it is found by the court that a judgment has not been obtained regularly, the defendant is entitled to have it set aside *ex debito justitae* is no longer correct. Irregular judgments will not be automatically set aside. The courts will ask the question whether or not the irregularity is so fundamental that it would be in interest of justice to allow it to survive or not. This involves in some circumstances looking at the merits or non merits of the defense. Further if the court finds that there is no prejudice to the parties or justice demands it, the court will amend the irregularities in the default judgment. This is what was done by Siti Norma Yaakob J (as she then was, now the Chief Judge of Malaya) in the case of *Malaysia Building Society Bhd v. Lesco Development Corp Sdn Bhd & Ors* [1988] 3 MLJ 273. At p. 274 of the report she observed as follows:

G Clearly the judgment has not complied with O. 42 r. 12 but the effect of such non-compliance does not render the judgment a nullity, as O. 2 r. 1 treats such failure to be an irregularity which can be remedied under r. 2 of the same Order, by the court setting aside either wholly or in part the proceedings on which the failure occurred or amending or varying the judgment or order dealing with such failure. Thus the power to cure an irregular judgment is no longer confined to the slip rule under O. 20

H r. 11, which is limited in its application as only clerical errors and slips can be corrected. The inclusion of 13.5% interest pa in the judgment can hardly be described as an error as the plaintiff had intended all along to claim that rate of interest after judgment as expressed in the statement of claim. However, by virtue of O. 2

I rr. 1 and 2, the court is still empowered to cure such a judgment provided that the first defendant will not be in any way prejudiced by such an amendment.

[12] Also the Court of Appeal had amended an irregular judgment in the case of *Lee Tain Tsung v. Hong Leong Finance Bhd (supra)*. In that case the default judgment contained a tax indemnity amount of RM93,362.37 which the plaintiff conceded that it should not be included. The defendant after a lapse of eight years applied to set aside the judgment under the inherent jurisdiction of the court arguing that the judgment is irregular and as such should be set aside *ex debito justitiae*. The court agreed that the default judgment was irregular but refused to set aside it on the ground that the breach was not a failure to comply with a statutory requirement. In the words of NH Chan JCA, this is “plainly a case where we should put the matter right and this we do by amending the judgment to reflect the correct amount, which is RM1,117,161.29 (1,211,523.66 - 93,362.37).”

Findings Of The Court

[13] I shall now deal with the Mr. Kenny Yi’s submission.

To start off, I set out the details of the statement of claim and the terms of the default judgment. The reliefs sought for in the statement of claim are as follows:

1. the sum of RM86,743.14
2. late payment charge on the Minimum Payment Due at the rate of 1% (subject to a minimum of RM5.00 and a maximum of RM50.00) calculated on a monthly basis as from the 19th June 2004 until full and final settlement,
3. finance charge thereon at the rate of 1.5% per month calculated on a daily basis as from the 19th June 2004 until full and final settlement, and
4. the plaintiff’s legal costs as between solicitors and clients and disbursements incurred in the action.
5. costs:

(a) Court fees	RM208.00
(b) Advocate fees	RM1,250.00

[14] In the default judgment, the terms are as follows:

1. the sum of RM86,743.14
2. late payment charge on the Minimum Payment Due at the rate of 1% (subject to a minimum of RM5.00 and a maximum of RM50.00) calculated on a monthly basis as from the 19th June 2004 until full and final settlement,

- A 3. finance charge thereon at the rate of 1.5% per month
calculated on a daily basis as from the 19th June 2004 until
full and final settlement, and
- B 4. the plaintiff's legal costs and expenses as between solicitors
and clients and disbursements incurred in the action in the
sum of RM6,739.82 (emphasis added).

Grounds 1 And 2

C [15] I shall deal with these grounds together as they concern cl.
2 in the default judgment.

[16] For ground 1, Mr. Kenny Yi contends that cl. 2 of the
default judgment contravened cl. 7(g) of the agreement (exh 2 at
p. 35 of the record of appeal) which provides that:

- D If the Cardholder fails to pay the Minimum Payment Due by the
Due Date, a further charge of 1% of that Minimum Payment Due
(subject to a minimum of RM5 and a maximum of RM50) will
be debited to the Card Account on the next Statement Date. The
sum so debited shall until paid bear the Finance Charge, and the
provisions of the preceding paragraph in relation to the
E capitalization of the Finance Charge shall equally apply.

- F [17] The contention here is that cl. 7(g) of the agreement only
requires the appellant to pay the respondent the minimum
payment due by the due date for the avoidance of the charging
of the late payment charges at the rate of 1%. By virtue of the
words "until full and final settlement" in cl. 2 of default judgment,
it implied that the respondent would continue to charge the late
payment charges unless and until the appellant paid the
outstanding (if any) in full and final settlement. The making of the
G minimum payment was therefore insufficient for the avoidance of
the late payment charges.

- H [18] For ground 2, Mr. Kenny Yi contends that cl. (2) of the
default judgment is uncertain as it did not particularize on the
definition of the 'minimum payment due', the amount of the
'minimum payment due' and the amount that the 1% was
chargeable on.

[19] To recap, cl. 2 of the default judgment reads as follows:

- I late payment charge on the Minimum Payment Due at the rate of
1% (subject to a minimum of RM5.00 and a maximum of
RM50.00) calculated on a monthly basis as from the 19th June
2004 until full and final settlement.

[20] With respect, one must read the statement of claim and the default judgment together and not individually as is being done by counsel. When they are read together there is no confusion what minimum amount means as it is defined and furthermore how the debt is calculated is exhibited by the respondents in their affidavits. The phrase “until full and final settlement” cannot mean what counsel wants this court to mean for the simple reason the counsel’s interpretation is clearly contrary to what is stated in the statement of claim. The late payment charge of 1% is levied only on the minimum payment due which is defined as 5% of the total outstanding under the card account or RM50 whichever is the greater and when there is a failure to make the minimum payment. Paragraphs 4(4) and 4(6) of the statement of claim make that very clear and they respectively provide that:

the Defendant is obliged to make payment of the total amount outstanding under the card account as specified in the Card Statement on or before the date specified therein (hereinafter referred to as “the Due Date”) or may elect to pay 5% of the total outstanding under the card account or RM50.00, whichever is the greater (hereinafter referred to as “the Minimum Payment Due”) and

the Plaintiff shall be entitled to charge a late payment charge at the rate of 1% on the Minimum Payment Due (subject to a minimum of RM5.00 and a maximum of RM50.00) (hereinafter referred to as “the late payment charge”) until full and final settlement. Such sum shall be debited to the card account on the due date of the next Card Statement and shall until paid bear the finance charge.

[21] In respect of the case of *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241 SC, the factual matrix in that case are different. This much is clear from the judgment of Edgar Joseph Jr SCJ where he said:

Having regard to the provisions aforesaid, we consider – contrary to what the learned judge held – that resort to the loan agreement would still have not resolved the ambiguities in the default judgment in favour of the respondent, for the appellant would still be perplexed as to the amount of interest he would have to pay, and so he would be perplexed as to the total sum he would have to pay under the default judgment in order to avoid enforcement proceedings. We say so, because, in epitome, the default judgment, *included an element of contractual interest at a fluctuating rate and when such interest was to run depended upon the absolute discretion of the respondent, and so was clearly uncertain.*

- A We were thus satisfied that the appellant had demonstrated that
on the face of it, the default judgment, insofar as liability
thereunder, for the payment of contractual interest was concerned,
did not specify sufficiently or at all, the several matters to which
we have referred, and so was riddled with uncertainty, serious
B enough to render it an irregular judgment within the meaning of
the authorities. (emphasis added)

[22] In our present case, there is no such uncertainty.

- C [23] Accordingly I hold that the grounds 1 and 2 are
misconceived.

Ground 3

- D [24] For this ground, Mr. Kenny Yi at p. 6 of his submission
contends that the terms of the default judgment entered by the
respondent are different from the prayers in the statement of claim.
That difference only lies in the sum of RM6,739.82 being “the
respondent’s legal fees as between solicitors and clients and
disbursements incurred in the action.” Counsel’s complaint is that
that amount was never quantified in the statement of claim and
E hence cannot be included in the default judgment. Hence he
submits that the inclusion of RM6,739.82 made the default
judgment irregular and on this ground alone it should be set aside
ex debito justitiae. For this submission, he relies on the case of
F *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul*
Rahman [1995] 4 CLJ 127 CA, where the Court of Appeal said:

- G A judgment would be deemed irregular if it was taken for more
than what was due. In this case, the terms of the default
judgment were different from the prayers in the statement of claim
and the damages obtained were more than the amounts prayed
for. Therefore, the default judgment was irregular and the
appellant was entitled to have it set aside *ex debito justitiae*.

- H [25] I totally agree that this part of judgment is irregular for the
simple reason that the appellant was not given a chance to be
heard as to whether or not 13th Schedule of the Advocates
Remuneration Rules 1988 applies. Exhibit 3 in the respondent’s
1st affidavit clearly shows that the letter to the registrar was not
copied to the appellant. Though this may be an established
practice (as informed by counsel), it is nevertheless a wrong one
I which must be stopped. No doubt that the successful parties are
entitled to their costs but the defendant cannot be shut out from
disputing the amount.

[26] The issue which confronts me is whether or not because of this irregularity, the whole judgment should be set aside *ex debito justitiae*. A

[27] In considering this issue I keep in the forefront of my mind the general principles I set out earlier in my judgment. B

[28] Having gone through the submission of Mr. Kenny Yi and the affidavits of the defendant together with exhibits thoroughly, I find that there is one glaring omission and that is there is no genuine dispute by the defendant to the claimed amount. We see that as well in the proposed defense (pp. 24-25 of encl. 4). In fact the proposed defense is littered with the phrase of “the plaintiff is put to strict proof”. It is trite law that mere denials do not amount to a defense. In *Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690) Shanker JCA said: C
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When an application is made for summary judgment under O. 14 supported by an affidavit which goes to show that there is no defence, the defendants must show cause why leave to defend must be given. This means that the defendants must provide answers on oath which constitute evidence that they have a defence which is fit to be tried. Denials in a defence do not constitute evidence. They are challenges to the other side to show proof. In the present case the guarantors do not appear to have appreciated this. Their affidavits merely relied on the defence they pleaded, which consists of bare denials and points of law which they could not sustain. E
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[29] (See also *Wallingford v. Mutual Society* [1880] 5 App Cas 685 and *Chong Chow Fong v. Ban Tuck (M) Sdn Bhd* [1983] 2 CLJ 25; [1983] CLJ (Rep) 508).

[30] The appellant’s stand is understandable as he had by a letter dated 18 November 2004 admitted to his indebtedness. As the letter provides a clear picture of the mindset of the appellant, it is appropriate that I produce it in full herein: G

URGENT

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Ee & Lim

Nov., 18, 2004

Advocates & Notary Public
No. 4 Petanak Road, 93100
Kuching, Sarawak

Your Ref: YTE/hl/397/2004 I

A Tel : (082) 247766
Fax : (082) 418159

Dear Sir,

Re: Summons No. 52-480-3004-III

B **HSBC Bank Malaysia Berhad vs. Richard Tsen Wei Tseng**

I refer to your above letter and wish to enquire that if your esteemed firm or the HSBC bank is paying me the airfare to and fro from Miri to Kuching and the hotel accommodation in Kuching?

C Since I have never, never attended any court case in my life time I really do not know how many nights I would have to stay in Kuching? What about my food and other transportation expenses?

D May I suggest that I would use this money to pay by installment to the Bank? I could not agree the total figure which I owe the Bank. I am not receiving any statement updated. I did not continue to make any payment because the bank cancelled my card even though I paid RM3,000.00. I could not afford to pay more to the bank because my business was not doing good due to poor economy and other unforeseen circumstances. The Bank is aware that I use the card for my MLM business propose only. My two companies namely Golden Pleasant Sdn Bhd., and Eternal Excel Sdn Bhd., owe me more than RM1,000,000.00 I am over committed at the moment. I could not even afford to update my housing loan which is less than RM2,500.00 monthly.

F Please ask the bank to convert the total outstanding into a fixed loan and I will work out how much to settle monthly by installments.

G Meanwhile I tender my sincere apology for not being able to attend your court case since I do not have extra fund to travel.

Any inconvenience is much regretted please.

Yours faithfully,

H Richard Tsen Wei Tseng

I [31] Mr. Kenny Yi seeks to excuse this letter on the ground that the appellant had no legal advice when he wrote the letter. With respect, from the documents before this court one can surmise that the appellant is not so to say the ordinary man in the omnibus. He was given a Platinum Visa card which to this court's knowledge is only meant for well to do businessman of the

community. He had as at January 2005 raked up 243,037 rewards points on the card which goes to show that he had constantly used the facility attached to the card for his business without any complaints. He knew what he was doing and had utilized the benefits of the facility granted to him. In the aforesaid letter, he requested the respondent to convert his indebtedness to a fixed loan, a practice used by the business community and the banks to restructure a non performing facility. This shows that the appellant is an experienced businessman.

[32] With those facts before me and applying the applicable legal principles to the matter at hand, I am of the view that this is not a case where I should set aside the whole judgment because of this irregularity. If I were to set aside the whole default judgment, the consequence would be that this matter will be dealt with again by the Sessions Court and no doubt will be faced with a summary judgment application by the respondent. This will no doubt add to the court's workload unnecessarily. As this is in my view a mere irregularity, the interest of justice demands that I only amend cl. 4 of the default judgment and I do so by amending it to read as follows:

The Plaintiff's legal fees as between solicitors and clients and disbursements incurred in this action be taxed by the Registrar.

[33] So that my judgment is complete, I shall deal with the case of *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 4 CLJ 127 which Mr Kenny Yi relies on for his contention. I agree with the learned Sessions Court Judge when she opined that that case is distinguishable. There the plaintiff's claim for monetary relief was as follows:

- (a) (not applicable);
- (b) Damage on the basis of market rentals at RM12,000 a month from 1 April 1993 or 1 June 1993 until 30 September 1993;
- (c) Damages on the basis of market rental at RM15,000 a month from 1 October 1993 until the date to be fixed by this Court.
- (d) (not applicable);

[34] In the judgment in default the relief obtained was as follows:

- A (i) (not applicable);
- (ii) to pay to the plaintiff damages for unlawful occupation at the rate of RM15,000 per month commencing 1 June 1993 until the delivery of vacant possession.
- B [35] From the above, one can discern that the plaintiff there had in the judgment in default obtained something which he did not ask for. His claim was for RM12,000 from 1 April 1993 or 1 June 1993 until 30 September 1993 while in the default judgment he was given RM15,000 per month commencing 1 June 1993 until
- C the delivery of vacant possession.
- [36] In the present case, the respondent did claim for legal costs as between client and solicitor. The only mistake was that the respondent's counsel followed an established but wrong practice of
- D getting the registrar to assess the costs without the presence of the appellant. Furthermore the claims in *Cheow Chew Khooon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman (supra)* included a claim for possession (which was interrelated to the monetary claim) which the court held the judgment in default on possession was
- E entered prematurely. That irregularity was held to be so fundamental that it was not curable.
- [37] On the foregoing grounds, I dismiss the appellant's appeal with costs to the respondent unless agreed to be taxed. I further
- F order cl. 4 of the default judgment be amended as set out in my judgment.

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